No. 593

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In the Supreme Court of the United States

OCTOBER TERM, 1944

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.

Petitioners

v.

HOMER H. JOHNSON

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The Government's brief serves to project a narrow issue for decision—whether reversal of the judgment below should rest upon correcting a basic jurisdictional defect or upon establishing a complicated, procedural strategy.

From beginning to end, this case has involved a going radio station, and only a going radio station, the most important element of which—indeed its very essence—is the federally granted license. The whole case revolves about and depends upon that license.

One basic principle is clear: that the Nebraska Court cannot cancel the Commission's license or otherwise interfere with its licensing functions. Thus, as the Government states (Brief of United States, pp. 12 *et seq.*), the judgment below is plainly defective not only in purporting to void the license and order a retransfer thereof, but in attempting to control the parties in their presentation of the matter to

the Commission: if the judgment could go so far, the Commission would be seriously handicapped in discharging its responsibility of obtaining facts and choosing licensees.

Restricting the form of the judgment to apply only to the licensed facilities, as suggested by the Government, does not save it. The licensed facilities have never been separately projected as an issue; on the contrary, they have been involved only in association with the license, from which they derive their value. The case, and transactions involved in it, have been treated throughout on that basis by all parties: by the petitioners, in transferring a going operation—in conditioning the transfer of facilities upon the assignment of the license (Ex. 1 to Ans., R. 21, 23); by the Commission, in predicating its approval of the assignment of license as required by Section 310(b) of the Act upon the transfer of a going operation (Ex. 32, R. 661, 662 A); by the respondent, in seeking the return to the Society of a going radio station—license as well as licensed facilities, particularly the license (R. 1, 10); by the court, in reaching its decision (R. 745), in particular in its finding of inadequacy of consideration (R. 755-760) which can rest only on the value attributed to the license—to the monopolistic privilege flowing therefrom; by the court, in its judgment, as well, acting directly both on the license and the licensed facilities, as well as compelling the parties to act with respect thereto (R. 744, 745).

Limiting the judgment to the licensed facilities (R. 794, 797) does not alter the case in any substantial respect. For the license remains the real subject matter of the litigation. The licensed facilities are important only for the impact they have on the license—only as a handle for accomplishing indirectly but effectively what cannot be done directly. The court is thus enabled to wag the dog by its tail. For the impact of the judgment as to the licensed facilities upon the Commission's functions is little different than a judgment directly against the license. By ripping the licensed properties out from beneath the license, it kills the license itself, and constitutes an equally serious impairment of

the Commission's functions. So much is plain and conceded by the Government.

The Government, however, strangely tolerating this interference, argues that such a result is within the power of the State court to effectuate (Brief of United States, pp. 7-8, 16-19). This conclusion cannot be supported. It rests upon an abstract distinction between "physical property" and "license"— a "jurisprudence by conception" which ignores vital distinctions. And the Government, accordingly, ignores the real character of this case. The analogies cited (pp. 5-6) are inapplicable to this case; the arguments advanced do not sustain the judgment in this case. It makes this contention, indeed, only to turn once again to a recognition of the obvious weakness in this position and to propose to meet it by an elaborate scheme of procedure (pp. 14 *et seq.*). The same basic principle invalidating the court's direction with respect to the license and the parties' duty to effect the issuance of a new license to the Society invalidates the equally substantial barrier against the integrity and freedom of administrative exercise of the licensing functions resulting from the judgment as to the licensed facilities. Indeed, the elaborate but unworkable procedural maneuvers suggested by the Government (pp. 19-22) to keep the license and licensed facilities together are designed to achieve the very objectives of maintaining unimpaired the functions of the Commission and preserving public interest in continuity of service. And realization of these objectives requires a surer foundation than the discretion of the State court. Nothing less than a denial of the court's jurisdiction to give a judgment so encroaching upon administrative action and so prejudicial to public interest will serve. The accommodation of private and public interest, judicial and administrative authority and State and Federal jurisdiction can best be achieved in the situation before us by limiting the respondent to an action for damages.

Moreover, since the finding of inadequacy of consideration involves the determination of matters beyond the

jurisdiction of the court below to determine, the judgment resting thereon falls.

Finally, and regardless of the court's jurisdiction, the finding of inadequacy of consideration is intermingled with conclusions of law upon federal questions and is without supporting evidence. Under these circumstances this Court will review the record to prevent denial of a federal right on an insupportable basis.

I

THE STATE COURT CANNOT CANCEL OR OTHERWISE DEAL WITH THE LICENSE OR DIRECTLY OR INDIRECTLY INTERFERE WITH THE LICENSING FUNCTIONS OF THE COMMISSION

One basic principle is clearly established: the State court cannot cancel or otherwise deal with a broadcasting license issued by the Commission, or encroach upon its jurisdiction by impairing in any way its freedom or ability to discharge its licensing functions. To permit any such interference with the Commission's action would countenance the assumption of jurisdiction by a State court which has been confided by Congress to a centralized, expert, administrative control in the interests of protecting and fostering the public interest in the use of radio. Section 402 of the Communications Act sets out the limits of judicial control of Commission licensing functions. And attempts at judicial control not in accordance with those prescribed procedures, whatever the means employed or grounds relied upon, must fall.

In *Federal Communciations Commission* v. *Columbia Broadcasting System of California, Inc.*, 311 U.S. 132, the Court said (pp. 133, 134):

> "In so far as action of the Federal Communications Commission is subject to judicial review, the Act bifurcates access to the lower federal courts according to the nature of the subject matter before the Commission. . . . Therefore as to the general class of orders dealt with by Section 402(a) jurisdiction

rests exclusively in the appropriate district court, specially constituted, with direct appeal to this Court."

Thus, it is conceded that the direction in the judgment below that "the transfer of the license to operate the station be vacated and set aside" and "that the license to operate the station be returned" (R. 745) cannot stand.[1] This is an attempted exercise of power by the Nebraska Court which it does not possess. It is an attempt to give relief by way of setting aside an order of the Commission in the exercise of its licensing functions.

The judgment not only purports to set aside the license and order its return to the Society, but directs the parties "to do all things necessary for that purpose" (R. 745). As the Government brief points out (p. 13), the judgment not only prevents the parties from making a full presentation to the Commission, but impedes the Commission in securing the full information required by the Act. Radio Station WOW, Inc. would even be prevented from informing the Commission that more than 20% of the Society's stockholders had become aliens, thus disqualifying the Society under the statute (Section 310(a)(4)) from holding a license. Moreover, by imposing a legal duty upon the parties to effect the issuance of a license to the Society, the Court has in large measure already determined who the licensee shall be. Not only, therefore, is the Commission disabled from discharging its responsibility in the choice of licensees, but the court has performed part of its functions. Here also there is a violation of the basic principle forbidding impairment of the Commission's licensing functions.

The same principle, we submit, invalidates the judgment below, even if, as suggested by the Government, it is limited to the licensed facilities—to requiring that they be transferred to the Society.

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[1] Not only did the Nebraska Supreme Court, in disposing of the Motions to Dismiss and for the Rehearing filed by Petitioners (R. 769, 775, 778, 782) fail to amend its original judgment, as stated in the Government's brief (p. 4), but it expressly "adhered to" its former judgment (R. 794).

II

BY TAKING THE LICENSED FACILITIES OUT FROM UNDER THE LICENSE, THE JUDGMENT BELOW IMPAIRS THE LICENSING FUNCTIONS OF THE COMMISSION

A. THE SUBJECT MATTER OF THIS LITIGATION IS A GOING RADIO STATION, PARTICULARLY ITS LICENSE; LIMITATION OF THE JUDGMENT TO THE LICENSED FACILITIES DOES NOT SUBSTANTIALLY ALTER ITS PURPOSE OR EFFECT

This case has throughout involved a going radio station—and nothing else. The most important element of that station is its federally granted license. Without the license the property is so much acreage and salvageable equipment. As the Government's brief, with appropriate understatement, says (p. 15):

> ". . . the station as an economic entity includes the license, and the major part of its value depends upon the license. Even the physical property is worth much more as an operating unit than as salvage."

We ignore the real nature of this case unless it is realized that what is at issue is the disposition of a going radio station, the very essence of which is its license.

The case has, from beginning to end, been treated by all concerned on that basis. The *petitioners*, the Society and WOW, Inc., made an agreement for the transfer only of a going radio station (R. 21 *et seq.*); the transfer of the facilities was expressly made to hinge upon the contemporaneous assignment of the license with Commission approval (Ex. 1 to Ans., R. 21, 23, par. 2).

The *Communications Act* throughout reveals the interdependence of license and licensed facilities (Petitioners' Brief, pp. 37-39).[2] The specific statutory provision for assignment of licenses, Section 310(b) of the Act, which has been applied and is involved in this case, is predicated upon and comes into operation only upon the transfer of a going radio station. A license cannot be assigned under that provision *in vacuo*. It can be assigned only in associa-

[2] See *infra*, fn. 4, p. 18.

tion with the transfer of a station with full facilities—with the transfer of the particular facilities specified in the license. Were a new operator to seek a frequency used by another, but to set up different facilities—and even the same equipment in a different operation—he would have to apply for a construction permit and thereafter for a new license; the other's license could not be "assigned" to him. *Hearst Radio Inc.*, 7 F.C.C. 292, 294 (1939); *City of Atlantic City*, 7 F.C.C. 485, 489 (1939). This is but the application to broadcasting of the established rule treating a franchise to render a public service and the property devoted to that service as a unity (*infra*, pp. 22-34).

The *Commission* dealt with the case, as it was required to do by Section 310(b), solely on the basis of the transfer of a going radio station. Its order approving the assignment of license makes this clear. The Commission's consent was expressly

> ". . . based upon the representations made by the assignor and/or assignee . . . that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith" (Petitioners' Brief, p. 61; Ex. 32, R. 661, 662A).

The *respondent* sought and seeks the return to the Society of a going radio station—and nothing less—the license as well as the licensed facilities, and particularly the license. The petition throughout is based upon the fact that Radio Station WOW, comprising license and licensed facilities, was transferred (R. 1-10). Its prayer was that

> ". . . . the aforesaid lease and assignment of license . . . be declared illegal and void and . . . immediately cancelled and terminated . . ." (R. 10).

The *court* below dealt with the case as presenting a contest solely over a going radio station, license included. Its first opinion reveals that it was the fate of that and nothing else which it was deciding (R. 745 *et seq.*). Basic to its decision is the finding of inadequacy of consideration. And it is apparent that that finding necessarily rests for the

most part upon the value inhering in the license—in the federally granted monopolistic privilege to broadcast. As the Government's brief states (p. 16), "The physical property of the station . . . is worth not more than $175,000," but, apart from other very valuable considerations, the Society is to receive "an average net rental of $74,000 per year" (pp. 16-17); "capitalizing this figure produces a value of approximately $1,000,000" (p. 17). This valuation, as the Government points out (p. 17), is plainly

> ". . . attributable largely to intangible elements such as good will, going concern value, and an expectancy that the license will be continued."

As it makes clear, this value "would cease with a termination of the license" (p. 17). Thus, the very dominant basis for the judgment below, the finding on inadequacy of consideration, is a going radio operation, of which the license is plainly, by far, the major factor.[3]

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[3] The New York Court of Appeal's analysis, in *People ex rel. Met. St. Ry.* v. *Tax Commrs.*, 174 N.Y. 417, 67 N.E. 69 (1903), of the factors constituting the value of a franchised operation aptly illustrates the extent to which the Nebraska Court must have taken the license into account in finding an inadequacy of consideration (pp. 440-442):

> "The relation between the intangible right to run cars in the streets and the tangible property in the rails to run the cars on, is so intimate as to be inseparable in any practicable system of estimating values. Of what value are poles, strung with wires, standing in the street, without a special franchise to use them to carry electricity or send the mysterious message? What are appliances worth, when made for a special purpose, if they cannot be used for that purpose? What are rails and ties worth, when so fastened to the land in a public highway as to be legally a part of it, without a special franchise to place and use them there as part of a railroad? All the mains and pipes, poles and wires, rails and ties of the relators, when separated from their special franchises, have no value except as firewood or old iron. Their only substantial value is the right to use them in connection with the franchise, and, hence, they are incidental to the franchise. As part of the franchise they are worth something, but severed from it nothing to speak of. Suppose a street railroad company should forfeit its special

The court, too, in its judgment leaves no question that it is disposing of a going radio station, with the license included. It ordered that the transfer of both the license and the station properties be "vacated and set aside"; that "the license to operate the station be returned", and that the parties "do all things necessary for that purpose" (R. 745).

In the face of this undeviatingly consistent record that what has been involved throughout in this case is a going radio station and only a going radio station, including its license, the Government takes the position that the judgment below can be saved merely by modifying its form so as to apply only to the licensed facilities. This is comparable to the lower court's afterthought, in its second opinion, that the license was an "incident to the suit only" (R. 798). The whole record recited above negates any such idea. Indeed, just the contrary is the case. This cannot be made into an action to set aside only a lease of physical property. The licensed facilities have never been separately projected as the subject matter of this litigation, or any of the transactions involved in it. To consider them alone in this case

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Cont'd.

franchise by a violation of the grant, what would its rails and ties be worth? They would cease to exist as rails and ties, and would vest in the owner of the fee. The expense of grading, placing them in position and paving around them, which is a large part of the original cost, would cease to be an investment and would be property no longer. They are worth virtually nothing except for railroad purposes and a railroad cannot occupy a street without a special franchise. Separate them from the franchise by taking away the street privilege, and they are destroyed. Their only value as rails and ties, as distinguished from so much old wood and iron, is gone. . . . The value of either resides in the union of both and can be practically ascertained only by treating them as a unit. Unless assessed together, both cannot be adequately assessed. A man of judgment, in valuing a wagon and especially in estimating its earning capacity, does not pass upon the body, wheels, top and tongue separately. We regard the tangible property as an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which as a going concern can neither be assessed nor sold to advantage, except as one thing, single and entire."

is to create an abstraction. They have never had any part in this case except as embraced in a going radio station and in relation to the license which gives them their value. They are the "incident" in this case. The license has been and remains, whatever the form of the decree, the real subject matter of this litigation. Without the license, there is no lawsuit; without it, the judgment of the court does not even have a rational basis. Only with it, does the judgment bear any reasonable relation to what has gone before. Only by being able to cause the issuance of a license to the Society is the judgment saved from the defect of the utterly arbitrary and capricious action of destroying the whole value of the judgment—of destroying the very thing upon which it itself is based, the license. The fact is, the case is not altered by narrowing the form of the decree.

The licensed facilities, to be sure, are important in this case, *but only in relation to the license which they support, only for the impact which they have upon the license, only as a handle for attempting to accomplish indirectly but equally effectively what cannot be done directly*—to set aside Commission action transferring the license to WOW, Inc. and cause the issuance of a license to the Society. There could be no clearer case of the tail wagging the dog. For, as we have shown (Petitioners' Brief, pp. 30 *set seq.*) and shall briefly repeat here, the effect of the judgment, even if limited to the licensed facilities, is little different from a judgment operating against the license itself. We shall then show that the contentions of the Government's Brief do not support its conclusion that the judgment below, limited to the licensed facilities, may stand.

B. BY TAKING THE LICENSED PROPERTY OUT FROM UNDER THE LICENSE, THE JUDGMENT KILLS THE LICENSE AND ENCROACHES UPON THE COMMISSION'S LICENSING FUNCTIONS

It may be taken as established that the judgment's direction as to the licensed facilities has the necessary effect of killing the license issued by the Commission. The license falls legally dead in two ways: first, under the requirement implicit in the Act (see Petitioners' Brief, pp. 38-39) and

made express by rule of the Commission (Section 3.71),[4] for continuity of operation. *E.g., Hearst Radio, Inc.*, 7 F.C.C. 296 (1939). This regulation has been adhered to to such an extent that the Commission, except for brief emergency interruptions, has refused to permit even the licensee possessing the licensed facilities to continue to hold the license while the station is forced to go off the air because of extremely difficult economic conditions imposed upon small stations at the outbreak of the war. *Astoria Broadcasting Co.* and *Petersburg Newspaper Corp.*, Broadcast Report No. 415, March 9, 1943.

Second, and *a fortiori*, the license is legally dead when the licensed facilities are removed from under the license which they support. A license is not an independent personal right, but an authorization for the operation of certain particularly specified physical and electrical facilities. *E.g., Hearst Radio Inc.*, 7 F.C.C. 292 (1939). If other properties were available—which they are not at this time—the simple fact remains that with the removal of the specific facilities, the license is dead. Even in the event other facilities could be made available, the owner must apply to the Commission for a construction permit and thereafter an entirely new license to authorize operation of the new properties.

This much is recognized by the Government. It agrees that the judgment with respect to the station properties, if permitted to stand, will cause the "loss of the broadcasting license" (Brief of the United States, p. 8).

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[4] Section 3.71 of the Commission's Rules provides:

"Minimum operating schedule.—Except Sundays, the licensee of each standard broadcast station shall maintain a minimum operating schedule of two-thirds of the total hours that it is authorized to operate between 6 a.m. and 6 p.m., local standard time, and two-thirds of the total hours it is authorized to operate between 6 p.m. and midnight, local standard time, except that in an emergency when, due to causes beyond the control of the licensee, it becomes impossible to continue operating, the station may cease operation for a period of not to exceed 10 days, provided that the Commission and the inspector in charge shall be notified in writing immediately after the emergency develops."

The encroachment of this judgment upon the Commission's functions is clear. It is direct and substantial. Here also the Government's brief supports our views.

In the first place, the judgment kills the license and thereby nullifies the very public service operation which the Commission authorized. Moreover, it directly attacks and nullifies the Commission's order approving the transfer of the Station to WOW, Inc. As we have shown (*supra*, p. 7), the Commission's approval of the assignment of license to WOW, Inc. was, as required by Section 310(b), predicated upon the transfer of a going radio station, of the specific facilities covered by the license. Only upon such a transfer was the Commission's consent operative. Accordingly, by removing the licensed properties from under the license, the judgment below sets aside the Commission's order. As a result, the judgment runs counter to Section 402(a) of the Act (Petitioners' Brief, pp. 66 *et seq.*), and, as well, violates established principles for preserving unity of franchise and property which have been subsumed under the Communications Act. (See, *infra*, pp. 22-34.)

In the second place, the judgment weighs heavily upon the Commission's exercise of its licensing functions. By depriving WOW, Inc. of the facilities and putting them in the Society, the Nebraska Court, as we have shown (Petitioners' Brief, pp. 63-64), has in large measure already determined who the licensee shall be. The whole problem in terms of the substantial time and scope of physical, economic and administrative action required in setting up a new station—even if materials were available, which they are not—is such that the party holding the whole facilities is much nearer to recognition as a licensed operator than the former licensee. The compulsion upon the Commission to serve the public interest by preserving the continuity of operation of an important broadcast service is so strong as substantially to affect the administrative choice between the Society and WOW, Inc. In addition, appropriate and approvable sites for radio stations are restricted. And the growth of air commerce substantially restricts the field even

further. Even if WOW, Inc. could find a suitable site, it may be presumed that the present site is the best. Accordingly, the service which an entirely new operation could render is likely to be electrically inferior to that which the Society could offer. This also would be a factor tending to predetermine the Commission's action.

The Government's brief recognizes the substantial interference with Commission action resulting from the judgment with respect to the licensed facilities. The extent to which the issuance of a license hinges upon the possession of the facilities is emphasized by the statement, not once but twice, that the Commission will be faced with "an application for the transfer of the broadcasting license, growing out of . . . the disposition of the physical properties of Radio Station WOW by the judgment in this case" (Brief of United States, pp. 14, 8-9). It is also recognized that the effect of the judgment "may be to shut off broadcasting by the station" (*Ibid*, p. 7) and that, entirely apart from the judgment's compulsion upon the parties to effect the issuance of a license to the Society, WOW, Inc. will be in a position to compete with the Society for the license, only if it "should . . . become equipped to" build a station (*Ibid*, p. 13). The whole of the Government's brief, concerned as it is with preserving continuity of service by keeping the license and licensed facilities together, is eloquent testimony of the influence which the judgment below would have upon Commission action.

To be sure, the Government contends that the Commission's action "with respect to the license will in no wise be *foreclosed* or *governed* by the judgment with regard to the property" (*Ibid*, p. 9).[5] Careful note must be made of the wording used here—*only* that the Commission's action with respect to the license will not be *"foreclosed"* or *"governed"*—not that the Commission's functions will not be "interfered" with or "encroached" upon. In view of the explicit recognition, just noted, elsewhere in the brief of the actual impact of the judgment, this statement can be

[5] All italics herein are supplied, unless otherwise noted.

taken only as a clear acknowledgment that there is substantial interference with the Commission's functions—thus carefully worded because of the necessity of maintaining a superficial consistency with the contention as to the Nebraska Court's jurisdiction. When unencumbered with legal conclusions, the Government's view as to the actual impact of the judgment is clear (Brief, p. 16):

> "Not only may the judgment in this case result in the *public's loss of broadcasting services* by Radio Station WOW for at least a period of time *if the Commission declines to consent to a return of the license to the Woodmen* of the World Society, but the grounds of the judgment as expressed in the court's opinion, *together with the judgment itself, will bear upon the Commission's exercise of the authority committed to it by the Communications Act.*"

It may fairly be taken as unquestioned, therefore, that the judgment with respect to the licensed facilities, if permitted to stand, constitutes a direct and effective attack upon the Commission's order approving the transfer of the station to WOW, Inc. and substantially impairs the free exercise of the Commission's discretion in performing its licensing functions. The Government, nevertheless, contends that the Nebraska Court's judgment with respect to the licensed facilities may stand. We have now, therefore, to consider the reasons advanced by the Government for tolerating *this* substantial and admitted encroachment upon the Commission's functions.

C. THE GOVERNMENT'S CONTENTION THAT THE NEBRASKA COURT HAS JURISDICTION TO GIVE THE JUDGMENT WITH RESPECT TO THE LICENSED FACILITIES WHICH WILL ENCROACH UPON THE COMMISSION'S FUNCTIONS IS, AS IT ITSELF RECOGNIZES, UNSOUND

The contentions advanced by the Government seem to be as follows: Nothing in the Act leads to the conclusion that the State courts may not deal with radio station property and there are several instances in which actions with respect to property may be maintained in the State courts (pp. 5-6); a radio station is just like any other business,

and the acquisition, encumbrance and disposition of property used in broadcasting are subject to the laws which govern business enterprises generally (p. 6); cases refusing to separate property from a franchise to which it is devoted apply to public utilities where continuance of the public service is jeopardized (pp. 6-7); the Act does not require Commission permission to discontinue broadcasting (pp. 7-8); and the Commission has consistently refused to assert authority with respect to the control of radio station property (pp. 9-11).

We shall consider each of these contentions. None has merit as applied to this case.

The Government's whole position is vitiated by two fundamental misconceptions upon which it is obviously based: first, the notion that broadcasting is just like any other business enterprise and, second, the dogmatic and absolute separation of a going radio station's "license" and "property" into two separate worlds.

The first misconception—that broadcasting is like any other business—permeates the Government's discussion in Point I of its brief (pp. 5-11), though there is a curious and ameliorating shift of approach in Point III (pp. 14-21). This misconception prevents a realization of the basic character of this case. To regard broadcasting as no different than any other business is to ignore vital considerations of public interest applicable here. It leads to resorting to the category of "public utility" to seek a distinction from cases preserving the unity of a franchise for public service and property devoted to that service (Brief of United States, p. 6), rather than to a search for the bases upon which that doctrine has been placed and an appraisal of their applicability here. (See, *infra*, pp. 23-27.)

It is, unfortunately, a matter of supererogation to have to show, let alone labor the point, that a broadcasting station is *not* just like any other business. It is sufficiently evident, and we have already shown (Petitioners' Brief, pp. 30-36), that no such view of the character of broadcasting can be supported. Radio broadcasting performs services in

and to the community which necessitate special consideration. It is one of the most important, if not *the* most important means of formulating public opinion and of disseminating news, enlightenment, and entertainment among our people. Broadcasting is an operation which rests upon a large measure of monopoly; it has a public significance of great import; it exerts a potent influence in the Nation upon the successful prosecution of the war and the promotion of the national defense; through its facilities countless millions are reached many times daily by the Government in its appeals, for war bond purchasers, enlistments in the many types of war service, compliance with rationing and price regulations, and the like. Is an operation performing this great public service to be lightly destroyed on the basis that it is just another business? It has, in short, such a distinctive and vital character, as to have formulated for it by the Congress a comprehensive, regulatory scheme in order to serve "public interest, convenience and necessity". It is a business conducted under a public license which confirms its unique character. Factually, on the compass of public interest, the needle is more attracted to this vital field than to any other. Any approach to this problem which does not rest upon these undeniable facts cannot fail to reach an unsound result.

The second misconception involves the wholly unsupportable technique of deciding particular cases by a "jurisprudence of conception". The mechanical division between physical property and intangible license causes the Government to treat as apposite certain other cases involving radio station property (Brief of United States, p. 5), which present entirely different problems from that involved here. It accounts for its anomalous acceptance of admitted, serious, actual encroachments upon Commission jurisdiction. In short, it leads the Government directly to two rigidly parallel and mutually exclusive jurisdictions of State court and Commission and underlies its view that the judgment below may stand provided only the form of the decree is changed. In all this, we submit, the Government ignores the real character of the case. It confuses the real

subject matter, the real purpose and the intended effect of this litigation with the *form* of the judgment. For to make an arbitrary, absolute separation of "property" and "license" here contradicts the whole course of the case and the transactions involved in it (*supra*, pp. 6-10).

Unless we are to blind ourselves to the real problem presented here, we must deal with this case and the issues involved, not on the basis of convenient but oversimplified categories, but on their own merits. We must deal with a going radio station on the basis of its unique status—at the least, on the basis that it is a going radio station and not two abstractions, inert property and intangible license. We must, finally, in the light of established principles and public policy, determine what the appropriate answer is to the problem presented here.

1. THE COMMUNICATIONS ACT NEGATIVES THE JURISDICTION OF THE COURT BELOW TO GIVE THE RELIEF GRANTED IN THIS SUIT

The Government first contends that there is nothing in the Act leading to the conclusion State courts may not deal with radio station property (Brief of United States, p. 5). No authority is cited. Rather some unsupported assertions with respect to other supposititious cases involving station property are advanced (pp. 5-6). Not only, however, do the purposes and provisions of the Act negate the encroachment on Commission functions involved in the judgment below, but the asserted analogies are entirely inapposite to this case.

Basic in the Act is the intent to establish a centralized administrative control, exercised largely through the licensing powers, which cannot be nullified or impaired except as provided in the Act itself. It is the Commission alone which is to choose broadcast licensees in the "public interest, convenience and necessity" (Sections 307-312, 319(a)) in order to ensure the best possible service to the public (Section 301); and participation by other tribunals in the exercise of that function by whatever means or on whatever grounds is clearly excluded (Petitioners' Brief, pp. 33-36). The

judgment below plainly impairs the integrity of that function.

Controlling here is the fact that, over and above the many provisions in the Act based on the interdependence of license and licensed facilities (*supra*, pp. 6-7; Brief, pp. 37-39),[6] the very provision applied in this case (Section 310(b)) applies only to the transfer of a going radio station, to an assignment of license only in conjunction with its supporting, specifically licensed facilities. The Commis-

[6] The license is but the means of carrying out the congressional purpose of providing an "efficient, Nation-wide . . . radio communication service with adequate facilities" (Sec. 151). " 'Radio communication' . . . means the transmission by radio of . . . signals . . . and sounds of all kinds, including all instrumentalities, facilities, apparatus . . . incidental to such transmission" (Sec. 153(b)). Since the Act is to apply "to the licensing and regulating of . . . radio stations" (Sec. 152(a)), and a "radio station . . . means a station equipped to engage in radio communication" (Sec. 153(k)), "No person shall use or operate any apparatus for the transmission of energy or communications . . . by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter" (Sec. 301). "[The] Commission . . . as public convenience, interest, or necessity requires, shall . . . (d) Determine the location of classes of stations or individual stations" (Sec. 303(d)). Throughout the Act, it is the licensing of a "radio station" and a "station license" which is provided for, Secs. 152(a), 303-305, 307, 309-312, 318, 326. It is a *"station* license" which is granted (Sec. 307(a), (e)), and it is always "granted for the operation of a broadcasting station" (Sec. 307(d)). A radio station under the Act may not be secured, granted or held except that it is applicable to certain specific physical equipment useful in radio communication. To recognize any license as being independent of specific facilities would violate "the purpose of this chapter . . . to provide for the *use* of such channels, but not the *ownership* thereof" (Sec. 301). The *"ownership* and location of the proposed station" (Sec. 308(b)) for which a license is sought are factors in the Commission's finding of "public convenience, interest, or necessity" (Sec. 307(a)). Each license states that: "Neither the license *nor the right granted thereunder* shall be assigned or otherwise transferred in violation of this chapter (Sec. 309(b)(2)), and Sec. 310(b) elaborates: "The station license required hereby, the frequencies authorized to be used by the licensee, *and the rights therein granted* shall not be transferred, assigned, *or in any manner* either voluntarily *or involuntarily* disposed of . . . to any person, unless the Commission shall, *after securing full information,* decide that said transfer is *in the public interest* and shall give its consent in writing." "The actual operaton of all transmitting apparatus in any radio station . . . shall be carried on only by a per-

sion's order approving the transfer under this Section (Ex. 32, R. 662A), and making explicit what is implicit in the statute itself, specifically rested upon the transfer of a going radio station, licensed facilities included, to WOW, Inc. As, we wish to emphasize, this case throughout has concerned a going radio station—at no stage the property alone—the court below cannot, by seizing hold of this necessary part of the Commission's action, be permitted to interpose itself into and set aside the very transaction passed upon and approved by the Commission in such a way as to kill the license issued by the Commission and to impair the Commission's freedom and ability to deal with the confused and anomalous situation thus thrust upon it. See *Hyer* v. *Richmond Traction Co.*, 168 U.S. 471, discussed *infra*, pp. 32-33).

Moreover, the judgment below nullifies the Commission's order contrary to Section 402(a). Even if limited to the licensed facilities, it acts directly against and sets aside the transfer of license to WOW, Inc. The result is the same as if the court framed its decree to enjoin WOW, Inc. from exercising its rights under the license issued by the Commission. *E.g. Venner* v. *Michigan Central R.R.*, 271 U.S. 127; *Village of Mantorville* v. *Chicago Great Western R.R.*, 8 F.Supp. 791 (D.Minn. 1934).

Central New England Ry. v. *Boston & Albany R.R.*, 279 U.S. 415, and *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, do not, as contended by the Government (Brief, p. 7), "by a parity of reasoning" make clear "that the [State] courts have jurisdiction with reference to the

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Cont'd.

son holding an operator's license issued" by the Commission (Sec. 318), and constant Commission inspection of "all radio installations associated with stations required to be licensed" is authorized (Sec. 303(n)). The interdependence of "station license" and "radio station" and "facilities" is, thus, repeatedly made clear. So intimate is the relation of license to facilities that a construction permit for the latter (minutely regulating the ownership, construction, and proposed operation of the station) is required as condition precedent to securing the former (Sec. 319). The statutory amalgamation of facilities to license is clear. It renders futile the attempt to talk about one as though it were unrelated to the other.

physical property of radio stations notwithstanding the licenses issued by the Commission."

The *Central New England* case raised the issue of whether or not an order of the Interstate Commerce Commission, authorizing abandonment of a branch line of defendant railroad, relieved defendant from his duties to pay rentals under a lease contract covering another line with plaintiff's assignor. The matter of the lease had not been presented to or passed upon by the Commission. The Court there held only that an action for damages could be maintained in the State court. It recognized, indeed, that an action cannot be maintained where relief is sought (p. 420):

> ". . . either that the order be set aside or that the carrier do or refrain from doing acts in a manner inconsistent with the order of the Commission directing or permitting certain administrative acts to be performed."

Such relief, it was acknowledged (p. 421), "would operate practically to set aside the order of the Commission."

While the Government also cites *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, for the proposition that a regulatory order would not deprive the courts of jurisdiction with reference to property and obligations which the order may incidentally affect but which were not before the agency for consideration, the case is not pertinent. In that case this Court sustained the order of the Commerce Commission which was attacked directly by a proceeding in the federal court under the Urgent Deficiencies Act. In sustaining the plenary powers of the Interstate Commerce Commission, the Court explicitly laid aside any such questions as are indicated by the statement in the Government brief. If, however, the Court had made such a holding, it would not be applicable to the case at bar. There is no question here of "the right of a State of incorporation, in a direct proceeding, to challenge the lease as *ultra vires*." 287 U.S. at 26. If questions of "incidental" effect were involved here, we would never have

been before this Court. In this case the attack is directly and exclusively on the transaction authorized by the Communications Commission.

Both the *New York Central* case and the *Pittsburgh & West Va. Ry. v. United States*, 281 U.S. 479 (discussed in our brief, pp. 68-75) are to be distinguished upon an additional ground. In neither of them did the plaintiff's case hinge upon the action of the Commission. The causes of action existed independently of the Commission order; the contrary is true in the instant case. Here, over and above the fact that the Commission's order was a prerequisite to the consummation of the transfer complained of, respondent's whole cause of action is founded upon the license and upon its transfer from the Society to WOW Inc. pursuant to Commission order. Without that transfer of the license, plaintiff has no complaint. Indeed, the essential basis for the judgment, i.e., inadequacy of consideration, rests squarely upon the license. The Commission's order is the central operative factor of the alleged injury sought to be remedied by the Nebraska Court. The point may be emphasized by the question: Assuming this case were sent back for reconsideration in the Nebraska Court as if only inert physical property were involved, can it be contended that plaintiff could make out a case? The question answers itself. Not only does plaintiff not want the inert physical property, but any possible claim of merit would vanish in thin air if the case were to be decided on the basis of a license-less physical structure.

The analogies cited (Brief of United States, pp. 5-6) to support the conclusion that there is nothing in the Act to indicate that State courts may not deal with radio station property show how unsound that conclusion is as applied to this case. For the instances cited are entirely inapposite to the case presented here. For example, in the mortgage and ejectment cases, the plaintiff is seeking land and only land. The license is only incidentally and collaterally affected. The plaintiff does not set out to acquire a broadcast station. The contrary is the case here, however. Here the property has never been the sole or even the

major subject matter of the litigation. That has been and remains the license. The land is significant only because of its impact upon the license. Here it is the property which is the incident in the suit; in those cases, it is the license. Moreover, there the plaintiff does not attack the very transaction passed upon by the Commission; he has no opportunity to present his case to the Commission. Here, however, the plaintiff, seeking to by-pass the Commission, is directly attacking the Commission's order, and the result is not changed by limiting the judgment to a factor essential to Commission action and dispositive of the whole case. We do not believe that in the supposititious cases this Court would not insist upon safeguarding the public interest. Suffice it to say that each of the foregoing factors disinguishes the cited examples from the case actually involved here.

2. THE COMMUNICATIONS ACT IS TO BE INTERPRETED IN THE LIGHT OF THE ESTABLISHED PRINCIPLE THAT COURTS WILL NOT REDRESS PRIVATE WRONGS BY REMEDIES DETRIMENTAL TO PUBLIC INTEREST

As a guiding principle in considering a very recent form of public service and as supporting evidence that the Nebraska Court's judgment here interferes with the realization of federal public policy with regard to radio broadcasting embraced in the Communications Act, we stated in our brief (pp. 72-73; see also p. 37), the well-established principle "that courts, in suits to enforce private remedies, will deny relief which will prejudice the public interest" (p. 72).

As illustrative of this principle, we referred, first, to cases holding "that property devoted to a public service will not be separated from the franchise it is necessary to effectuate, . . . [that] rights asserted against that property are subordinated to that principle in order to protect the public interest" (Brief, p. 37); second, to cases where some consideration of the public welfare or concern for an unimpaired public service led to denial of remedies, otherwise proper, which would disturb that public interest (Brief, pp. 72-73).

The Government has referred only to the first group of cases and, in restating them, appears to argue that they are inapplicable here because they involved "public utilities" (Brief, of United States, p. 6). No authority is cited for this view, and an analysis of the cases themselves (as well as of the others not discussed by the Government, *infra*, pp. 29-32) will demonstrate that the foundation of the principle protecting certain activities important to the public rests on considerations wholly applicable to radio broadcasting. In none does the protective principle depend on any conceptualistic categorization of "public utility". The cases themselves do not swing on this technical pivot.

Although the *kinds* of enterprises represented in the first group of cases differed one from another (railroads—canals—water companies—ferries, etc.) they rest upon these common factors: (a) a public franchise or license; (b) some degree of monopoly; (c) a public interest in continuity; nor do all of the cases involve a "public utility".

In each case, "the public character of the service," *Ackroyd* v. *Winston Bros. Co.*, 113 F.(2d) 657, 663 (C.C.A. 9th, 1940), meant that "the public . . . [was] directly interested in the results to be produced", *Foster and Co.* v. *Fowler and Co.*, 60 Pa. St. 27, 31 (1868). Public interest "in the results" implied public interest in uninterrupted service. At the same time, the nature of the service was such that it had to be restricted to a few. Only by restricting the number and by approving each operator could the desired service be obtained. The means adopted was the franchise. It represented the community's decision as to who should perform the public service in which it was so keenly interested. Since "the privileges conferred . . . [were] conferred with a view to the use and accommodation of the public", *Overton Bridge Co.* v. *Means*, 33 Neb. 857, 860, 51 N.W. 240 (1892), certain immunities—inapplicable to ordinary enterprises—were considered necessary. Allowing the facilities necessary to the effectuation of the public service, that is, of the franchise, to be taken away, whatever the means of doing so, except under a procedure which also provided for the transfer of the franchise, would mean

the frustration of the public interest or would compel the public to submit to performance of the service by one who had not been previously approved. But common sense dictated that the public's interest in and protection of the fruitfulness of the franchise be extended to the properties devoted to realization of the franchise. Regarded practically, the franchised operation was an intimate unity of franchise and facilities. As the New York Court of Appeals said, in *People ex rel. Met. St. Ry. Co.* v. *Tax Commrs.*, 174 N.Y. 417, 441-442, 67 N.E. 69 (1903):

> "Their only substantial value is the right to use them in connection with the franchise, and hence they are incidental to the franchise . . . the value of either resides in the union of both. . . . We regard the tangible property as an inseparable part of the special franchises . . . constituting with them a new entity, which, as a going concern can neither be assessed nor sold to advantage except as one thing, single and entire."

Likewise in *Hammock* v. *Farmer's Loan & Trust Co.*, 105 U.S. 77, 89, this Court, holding an Illinois statute regarding a right of redemption inapplicable to railroad properties separated from the franchise, said:

> ". . . a sale of the real estate, franchises, and personal property, separately, might, in every case, prove disastrous to all concerned, and defeat the ends for which the corporation was created, with authority to establish and maintain a public highway. . . . Thus, one person might become the purchaser of the real estate, another of the franchise, and still others of the personal property. If the railroad company should redeem the real estate, it could not employ it to any valuable end; for its franchise, to be a corporation and to use its real estate for railroad purposes, will have been sold to another, and there is no right under the statute to redeem the franchise, it not being real estate, but, rather a power or privilege, partaking more or less of sovereignty, and which may not be exercised without a special grant."

Plausible implications stemming from a possible analytical distinction between "franchise" and "property" were, therefore, not allowed to obscure the fundamental fact that it was the unity of the two which constituted the real worth of either, whether to the franchise holder, to his creditors, or to the public. Separation was not allowed, and those seeking to enforce merely private rights against the enterprise were shunted to remedies which would not cripple its continued existence.

Thus, in *Gue* v. *Tide Water Canal Co.*, 24 How. 257, a judgment creditor of a joint stock company franchised to operate a canal was seeking execution by sale against various properties necessary for the uses and working of the canal. This Court enjoined sale of the facilities because it would separate the properties from the franchise, whereas the value of the enterprise, to other creditors and to the public, inhered in their unity.

> "Neither can the lands or works essential to the enjoyment of the franchise be separated from it and sold under a fi. fa., so as to destroy or impair the value of the franchise." (Syllabus) 24 How. at 257.
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> . . . . . .
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> "The property . . . is of itself of scarcely any value apart from the franchise . . . [if] sold . . . without the franchise, would bring scarcely anything; but would . . . render . . . [the] franchise . . . utterly worthless." 24 How. at 263.

There was no mention of the variety of factors associated with the concept of "public utility" as it is understood today. This concept now involves a variety of considerations clearly absent and distinct from the reasoning underlying the *Gue* case and the others applying the same principle. In the *Gue* case, this Court was merely protecting the interest of both the corporation and of the public in the continued ability of the canal to operate. It realistically looked to the imperative need of keeping the franchise and property together. (See the discussion of the *Gue* case in *Hammock* v. *Farmer's Loan & Trust Co.*, 105 U.S. 77, 90.)

In *Ackroyd* v. *Winston Bros. Co.*, 113 F.(2d) 657 (C.C.A. 9th, 1940), a judgment lien for work done was sought to be executed against property of a reservoir company furnishing water to landowners in an irrigation district. The reservoir district owned a majority of the stock of the reservoir company. The reservoir company was a privately-owned, cooperative enterprise. It supplied water only to its stockholders and in proportion to the amount of shares which they owned. It was clearly not a "public utility." Execution was disallowed, not on grounds of the substantial public ownership or on any attempted "public utility" classification, but on the fact that the company was rendering an important service to the community. The importance of the service created a public interest in its continuance. Recognition of the interest forbade separation of franchise from property.

The same reasoning accounts for *Foster and Co.* v. *Fowler and Co.*, 60 Pa. St. 27, 30-31 (1868); *Overton Bridge Co.* v. *Means*, 33 Neb. 857, 859-860, 51 N.W. 240 (1892); *Sherman County Irrig. W.P.& I.Co.* v. *Drake*, 65 Neb. 699, 700, 91 N.W. 512 (1920); *Brady* v. *Johnson*, 75 Md. 445, 449, 26 Atl. 49 (1892); and *Northern Pac. R.R.* v. *Shimwell*, 6 Mont. 161, 9 Pac. 889 (1886). See also *Re Boston, Revere Beach & Lynn R.R.*, 31 P.U.R. (N.S.) 257 (Mass. Dept. of Public Utilities, 1939), cited in the Government's brief (p. 7). The Nebraska Supreme Court held in the *Overton Bridge Company* case, *supra*, that property of a toll bridge

> "... which is essential to the exercise of its franchise and the discharge of the duties it has assumed toward the general public, cannot, in the absence of statutory authority, be seized and sold to satisfy an ordinary judgment...." (Syllabus) 33 Neb. at 857.

In cases where other remedies were inadequate, sequestration of income might be allowed until the claims were satisfied, but the drastic killing of the franchise was steadily refused. See *Foster and Co.* v. *Fowler and Co.*, 60 Pa. St. 27, 31 (1868).

The very same factors underlying the cases just discussed are present here. The principle requires only a frank recognition of the social function of radio broadcasting and the importance of the continuous character of its service to the public. (See *supra*, pp. 15-16.) It is a franchised operation; and the limited number of franchise holders are selected and authorized by the single public agency. The Commission determines who the franchise holder (the licensee) is to be; it does so only with reference to specific facilities; and it is the agency called upon to consider and evaluate any transfer of the licensed operation to another. Here, as there, the value of the property is derived largely from the franchise, and without the property, the public service is destroyed. It is with this public service and this clear administrative function that the judgment of the Nebraska Court constitutes an illegal interference.

The existence of a legally enforcible duty to continue operations is immaterial to the application of the principle. We do, however, disagree with the Government's construction (Brief, p. 8) of Rule 3.71[7] of the Commission. That Rule requires a licensee to continue operations for the term specified in his license. Violation thereof subjects him to the penalties of Sections 502 and 401(a) of the Act. The Government also passes lightly over the point that in ceasing operation—even while holding the properties—the licensee suffers the loss of the franchise. It is difficult to imagine a more severe loss to the party or to the public. Moreover, the application for a license, and the grant thereof by the Commission, do create an administratively confirmed expectancy, stemming from the Act, that he will continue. This expectancy is clearly revealed in the detailed investigation required by the Act into the legal, technical, financial, and other qualifications of every proposed licensee and of the designation and engineering analysis required of the equipment specified as the proposed radio broadcasting facilities (Section 308(b)). And the stipulation required by Section 319(b) to be a part of every construction permit (that the permittee show spe-

[7] See, *supra*, fn. 4, p. 11.

cifically the earliest and the latest dates between which actual operation is to begin) indicates the extent to which the granting of a license creates and is based upon this expectancy. The entire environment is one of mutual commitment: The Commission, on behalf of the public, commits the frequency and authorizes its use; the licensee makes assurances that he is ready, able, and willing to serve the public for the period of the license and any renewal thereof. If he fails, the penalty is automatic. It must be remembered, moreover, that the principle is based not on the protection of the station, but on protection of the public. As Mr. Justice Holmes said in *Beasley* v. *Texas & Pac. Ry.*, 191 U.S. 492, 498, "the very meaning of public policy is the interest of others than the parties." On these grounds the protective principle is applicable. The acknowledged importance of the service, we repeat, creates an interest in the public in the continuance of the radio broadcasting operation—which is really an interest in the vitality of the broadcasting license. Without that vitality, which has been entrusted to the protection of the Commission, the "avowed aim of the Communications Act of 1934 . . . to secure the maximum benefits of radio to all the people of the United States" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217) cannot be realized.

Indeed, the cases cited by the Government (Brief, pp. 4-7) serve only to confirm and elaborate upon the principle we believe applicable here, or apply to situations not before us. Thus, that liens may be enforced "as respects utility property," "if the public service is not thereby endangered" (Brief, p. 6, citing *Missouri-Kansas-T.R.R.* v. *Mars*, 278 U.S. 258; *Davis* v. *Cleveland, C.C.& St. L.Ry.*, 217 U.S. 157; *Atchinson, T.& S.F.Ry.* v. *Wells*, 265 U.S. 101) is but the converse application of the principle governing here. We differ only in that we refer the principle to the basic considerations which brought it into being—and which exist in the instant case—rather than to the "public utility" categorization which the Government now chooses to apply to the *kinds* of enterprises represented by some of the cases cited. It is the public character of the service

rendered and the public's interest in controlling and continuing it which created the peculiar immunities.

Thus, in the *Davis* case (in disposing of the contention of the railway company that "to permit the instrumentalities used in the interchange of traffic by railway common carriers to be seized on process from various state courts does directly burden and impede interstate traffic within the inhibitions of the Act of Congress"), this Court said (p. 176):

> "This can only result if there is incompatibility between the obligations a railroad may have to its creditors and the obligations which it may have to the public, either from the nature of its service or under the Acts of Congress."

The other cases cited by the United States (pp. 6-7) give no reason why radio broadcasting should not be held within the protective principle of the other franchise cases. *International Milling Co.* v. *Columbia Transportation Co.*, 292 U.S. 511, involving the question of an unreasonable burden on interstate commerce and *Chicago, R. I. & Gulf Ry.* v. *Tarrant County W.C.& I. Dist.* (Tex. Civ. App.), 76 S.W. (2d) 147 (1934), cert. den. 295 U.S. 762, resting upon the exercise of a State's power of eminent domain (see *Hudson River R. R. Dist.* v. *Fonda J.& S.R.R.*, 249 N.Y. 445, 454-456, 104 N.E. 541 (1928)), plainly have no application here.

In attempting to render the franchise cases just discussed inapplicable here—by assuming that *categories* rather than *principles* are controlling—the Government completely ignores the other cases we had cited (Brief, p. 72), which support the interpretation for which we are contending. Both kinds of cases stand for the fundamental principle that the public's interest in the continuance of an important service, or in some consideration of public welfare, will be protected against those remedies enforcing merely private rights which threaten it.

Elliott Nursery Co. v. *Duquesne Light Co.*, 281 Pa. 166, 126 Atl. 345 (1924) (cited in our brief, p. 72) shows the

controlling considerations. That was a suit to enjoin the depositing of excessive and harmful ashes, cinders, soot, etc. on plaintiff's nursery by defendant's adjacent electric power plant. The court refused to grant the injunction and restricted the plaintiff's remedy to money damages because of the great importance to the entire community of the defendant's activity. It said (pp. 176-177):

> "We do not deem it important to discuss the questions which might grow out of the circumstance that defendant is a public service corporation and possesses certain powers of eminent domain. . . . We plant our conclusion on the broader general ground . . . that it would not be the part of wisdom . . . to enjoin the depositing of the substances . . . that the injury which would result from such action . . . would be incalculably greater than that which will happen from refusing it. . . ."

See, further, *Madison* v. *Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 366-367, 83 S.W. 658 (1904). Would it not seem "the part of wisdom" here to require that the public interests in radio broadcasting entrusted by the Communications Act to the Federal Communications Commission, and represented here by the continuing vitality of the license to WOW, Inc. be protected from the crippling effect of the lower court's judgment?

In *Beasley* v. *Texas & Pac. Ry.*, 191 U.S. 492 (cited in our brief, p. 72) the plaintiff sued to enjoin construction of a depot contrary to a contract (entered into by defendant's assignor to acquire land for the railroad from the plaintiff) not to build "any other depot along the line of said railroad within three miles north or south of the one stipulated for." On appeal, this Court denied the injunction. Mr. Justice Holmes said (p. 497):

> "Whether a railroad station shall be built in a certain place is a question involving public interests. Assuming that a contract like the present is valid as a contract, and making the more debatable assumption that the burden of the contract passed to a

> purchaser with notice, it does not follow that such a contract will be specifically enforced. Illegality apart, a man may make himself answerable in damages for the happening or not happening of the event he likes. But he cannot secure to his contractor the help of the court to bring that event to pass, unless it is in accordance with policy to grant that help. To compel the specific performance of contracts still is the exception, not the rule, and courts would be slow to compel it in cases where it appears that paramount interests will or even may be interfered with by their action. It has been intimated by this court that a covenant much like the present should not be enforced in equity, and that the railroad should be left at liberty to follow the course which its best interests and those of the public demand."

Mr. Justice Holmes then observed (p. 498) that it was admitted in argument the state railroad commission "had ordered the erection of the station in dispute," and that an injunction would create a serious conflict. He continued (p. 498):

> ". . . if it appears that an injunction would be against public policy, the court properly may refuse to be made an instrument for such a result, whatever the pleadings."

The denial of specific relief in these cases clearly did not rest on any "public utility" theory. It was founded solely upon protecting the "paramount interests" of the public in the railroad's ability to render public service. A remedy, enforcing a private right, which deleteriously affected those "paramount interests", was not to be tolerated.

So also, in the instant case, "paramount interests" are involved. Here also, the remedy sought in enforcement of the private right will gravely disturb the public service in question. In fact, the remedy sought here—tearing the property from the license—will utterly destroy the public service being rendered. See, further, *Texas & Pac. Ry* v. *Marshall*, 136 U.S. 393; *Hoard* v. *Chesapeake & Ohio Ry.*,

123 U.S. 222; *Armour & Co.* v. *Dallas*, 255 U.S. 280; *Seaboard Air Line Ry.* v. *Atlanta B.& C.R.R.*, 35 F.(2d) 609 (C.C.A. 5th, 1929); *Conger* v. *New York West Shore & Buffalo R.R.*, 120 N.Y. 29, 23 N.E. 983 (1890).

That the principle preventing relief prejudicial to public interest is not restricted to "public utilities", as the Government assumes, is further and strikingly illustrated by *Rockhill Tennis Club* v. *Volker*, 331 Mo. 947, 969 *et seq.*, 56 S.W. (2d) 9 (1932). There, plaintiff sued for specific performance of a contract to sell land which defendants, trustees of an estate, refused to perform on the ground that they planned to use the land as a part of an art gallery project. The court refused relief and restricted plaintiff to money damages on the ground that the projected art gallery would be of great benefit to the public. In that case, certainly, no "public utility" was involved. Plainly, the public interest there involved was of far less importance than the interests involved here, and yet the protective principles we have been discussing were applied. See also *Wheeler et al* v. *Standard Oil Co. of N.Y.*, 263 N.Y. 34, 188 N.E. 148 (1933); and see *Ackroyd* v. *Winston Bros. Co.*, 113 F. (2d) 657 (C.C.A. 9th, 1940).

Hyer v. *Richmond Traction Co.*, 168 U.S. 471, discloses how the various doctrines and interests we have been discussing should be applied and balanced. In that case, the plaintiff had agreed with the stockholders of the defendant to seek a city ordinance granting the two jointly the franchise to build and operate a street railway in Richmond, Virginia. While plaintiff was ill and out of town, the defendants appeared before the city officials and secured the franchise for themselves, counter to their agreement. The city officials knew of the agreement but for some reason granted the franchise to the defendants (as a corporation) exclusively. When plaintiff learned of the fraud, he sued to be decreed half-owner in the franchise, property, and stock of the defendant corporation. This Court, however, dismissed plaintiff's bill and restricted his remedy to an action at law for damages. The Court said (pp. 480-482):

"According to the allegations, the city counsel was aware of the two parties, of their agreement to unite in one application, of all the facts surrounding the agreement and proposed union, and with such knowledge it granted this public franchise to one party alone. In the exercise of its judgment in respect to the public interests, the city council determined that it was better that the defendants should have this franchise than that the united parties should have it. In the face of this determination by the authorities having special charge of the public interests, and ignorant as we must be of the reasons which controlled the city council in making this award to the one singly rather than to the two jointly, it would be improper for a court of equity to compel a consolidation of those interests . . . . The city holds its grantee responsible for the proper discharge of the duties imposed by its grant of the franchise. It may well have determined that it did not desire the plaintiff to have any interest in it, or anything to do with the management of the street railway, and that the best interests of the city would be subserved by committing it, primarily at least, to the defendants alone. Shall the courts say that such determination was erroneous, or may be overruled simply because of a private contract between two parties?

. . . . .

"This conclusion, while not interfering with the right of the plaintiff to maintain his action at law for the damages resulting from the defendants' breach of contract, at the same time preserves the city's control over the franchise, and upholds its determination as to the party or parties to whom it is willing to intrust such franchises."

So, too, in the instant case, the Commission, the sole proper selector of the franchise-holder, has granted a license to petitioners, WOW, Inc. It knew that an action was pending in the Nebraska courts, yet it proceeded to approve. That decision involved the commitment of a public domain of the greatest importance—the frequency. It created a public interest in the continuance of the *use* of that public domain *by the particular* party it had investigated and approved. The license represents, therefore, not merely a

permission to use a given frequency. It also involves an interest in the *use* of the frequency and that, *by the party selected.* The action of the Nebraska Court here threatens to destroy the *use* by the *approved* party. To that extent, it disposes of the license, whatever it says to the contrary. To that extent, its action is like the interference which was refused in the *Hyer* case. And in view of the provisions of the Communications Act relating to Commission approval of license transfers, such interference is *a fortiori* intolerable.

3. CASES SHOWING COMMISSION HAS NOT ACTED WHERE ONLY PROPERTY IS INVOLVED HAVE NO APPLICATION HERE WHERE BOTH LICENSE AND PROPERTIES ARE COMBINED IN A GOING RADIO STATION

Finally, in support of its contention that the interference with Commission functions resulting from the judgment below with respect to the licensed facilities is to be tolerated, the Government states that the Commission has consistently declined to assert authority with respect to the control of radio station property. The cases cited (pp. 9-11) obviously do not support the broad application which the statement is apparently intended to have. For, they are inapplicable to the issue involved in this case. Thus, in the *M. A. Leese* case (5 F.C.C. 364 (1938)) (Brief of United States, p. 9) there was involved only the transfer of shares of the *lessor* corporation. It did not hold a license. There was no transfer of the license involved. No transfer of facilities was involved. It has no pertinence to the instant case where the Commission, pursuant to the Act, approved the transfer of a license and its associated properties as a unit, and a State court purports to nullify that action, impair continuity of service, and interfere with licensing activities of the Commission by grabbing the handle afforded by the licensed facilities. The similar lack of pertinency of the cases of *Buffalo Broadcasting Corp.*, 9 F.C.C. 31 (1941), and of *WMCA, Inc.*, decided November 16, 1943, has already been shown in our brief (pp. 69-70, note 29). The other cases cited by the Government (Brief, p. 11) (*Hearst Radio, Inc.*, 7 F.C.C. 292, 295 (1939) and *City of Atlantic*

City, 7 F.C.C. 485 (1939) serve merely to show that the Commission has no concern over the transfer of property where it does not affect a license; in both cases the party was selling properties alone. There was no associated transfer of the license. Properties alone, and properties associated with a license, as here, present entirely different cases. Here the license and associated properties were transferred with Commission approval as a unit and it is that approval that is being nullified.

4. THE GOVERNMENT RECOGNIZES ITS CONTENTION THAT THE COURT BELOW MAY RIP THE LICENSED FACILITIES OUT FROM UNDER THE LICENSE IN THIS CASE IS UNSOUND BY SUGGESTING A "PRACTICAL ADJUSTMENT" WHICH, HOWEVER, IS NOT A SOLUTION FOR THIS OR FUTURE CASES

Not only do the reasons advanced by the Government fail to sustain its contention that the court below may rip the licensed facilities out from under the license in this case, but the Government itself, once it gets free of categories and abstractions and deals with facts, reveals the unsoundness of its own position.

This is implicit in the Government's objection—properly taken—that the direction compelling the parties to effect the issuance of a license to the Society both disables the parties from making a full presentation to the Commission and circumscribes the Commission's ability to obtain "full information" as required by the Act. Much more serious, however, are the limitations imposed upon the Commission by ripping the station properties out from under the license, since the parties could be made entirely free to participate in any proceedings before the Commission as to whom should be granted the new license—but all to no avail, if only the Society has the properties: The freedom of WOW, Inc. is the freedom of the completely paralyzed cripple to walk; the ability of the Commission to make an unfettered choice is also illusory. The basic defect of both is the assumption of power specifically to upset what the Commission has done so as to give rise to a situation where the parties and the Commission are hamstrung.

In Point III of the Government's brief (pp. 14 *et seq.*), it is frankly recognized, however diplomatically, that pro-

tection of both the public interest and the integrity of the Commission's functions requires preventing the property from being ripped out from under the license. It recognizes that whereas the license is, by far, the major element of a radio station (Brief, p. 15), still the properties in this case serve as the fulcrum upon which the license turns (Brief, pp. 14, 8). And the impact of the judgment below is adequately, though somewhat inarticulately, shown by the Government's plea for "an accommodation between the necessitities of adjudication and the requirements of *preserving a statutory administrative authority*" (p. 15); by its recognition that "the action of the court in this case has a *significant practical bearing upon the Commission's attainment of its statutory purposes*" (p. 16); by the statement "Not only may the judgment in this case result in the public's loss of broadcasting services . . . but . . . the *judgment . . . will bear upon the Commission's exercise of the authority committed to it by the Communications Act*" (p. 16); and finally by urging that "the physical property and the broadcasting license . . . be kept together" so that "the *interest* of all parties and *of the public be preserved*" (p. 21). In plain language, these mean that the judgment below as to the licensed properties interferes with the functions of the Commission.

Apparently conscious of the jeopardy to the public interest and the interference with the Commission's functions which would be imposed by the dogma recited in Point I of its brief (pp. 5 *et seq.*), the Government seeks a way out of its self-created dilemma by resort to a strategical "practical adjustment".

This solution is no solution at all. In the first place, even if the procedure were obligatory upon the Nebraska Court, the seeds of conflict, confusion and diverse administration are nurtured and permitted to flourish. The Government admits that the Nebraska Court "had no power to order a return of the federal broadcasting license or to direct the parties with reference thereto" (Brief, p. 12), to enter a judgment "preventing the petitioner Radio Station WOW, Inc. from opposing a return of the license" or

"from applying for a new license to operate a radio station in Omaha," or requiring "the Society to come before the Commission and apply for authority to operate a broadcasting station, if the Society, as this record indicates may be the case (R. 14-16, 287, 316), desires to confine its activities to the life insurance business" (Brief, p. 13). The Government argues, nevertheless, that the court below may "attempt to create a situation" through the officers of the Society to compel the disposition of the license (Brief, p. 14). And the record, in view of the repeated unsuccessful attempts of the Society to sell the station (R. 287, *et seq.*), admits of no conclusion except that the disposition, if any there is, must be back to the Society itself which does not want it and which has decided it is not in its best interests to have. In this case, the "practical adjustment" resulting from the "situation", therefore, means achieving the same result as the judgment which is admittedly invalid. Or, if the Society does not apply for the license, there is no adjustment at all, "practical" or otherwise. There can, in fact, be none, unless the parties are forced to do the very thing which the Nebraska Court attempted to order and which the Government concedes it does not have jurisdiction to order.

Underlying all the projected involvements whereby the State court or the parties turn up a new applicant for a license or some new operation other than that approved by the Commission, is the simple basic premise that the State court may kill the Commission's license and nullify administrative action taken in the public interest. The State court is still permitted, in a substantial and highly objectionable manner, to interpose itself into, interfere with, and participate in the Commission's licensing functions.

In the second place, the procedures are not obligatory upon the State court, as the Government concedes (Brief, p. 19). Thus, the imposition of the very restraints and interferences with the Commission's functions which the Government deprecates, is left to the discretion of the State court. It needs repeating that the question involved in this proceeding is a jurisdictional one. The Court below has

encroached upon the Commission's functions or it has not. It has jurisdiction to grant the present relief or it has not. With all deference we submit that however diplomatic it may be to suggest some procedures to permit the State court to do what is beyond its power—what, indeed, the Government itself obviously, though with some circumlocution, regards as an impairment of the Commission's functions—in a manner which might minimize the offense to the federal jurisdiction, the result is patently unsound.

D. A PROPER BALANCING OF INTERESTS HERE DICTATES THE RESPONDENT BE LIMITED TO AN ACTION AT LAW

The Government states, and we agree, that this case calls "for an accommodation between the necessities of adjudication and the requirements of preserving a statutory administrative authority" (Brief, p. 15). That accommodation can best be achieved by refusing to permit the State court to give the relief projected here against the licensed facilities which can only result in detriment to the public interest and impairment of the Commission's functions. Quite apart from the relief provided by the Communications Act, damages could have been sought in the State courts. That is an established, simple and appropriate means for accommodating public and private interests. (See cases cited *supra*, pp. 30-32.) As this Court said, in *Texas & Pac. Ry.* v. *Marshall*, 136 U.S. 393, 405:

> ". . . it is much more consonant to justice that the injury suffered by the City should be compensated by a single judgment in an action at law, and the railroad placed at liberty to follow the course which its best interests and those of the public demand."

It is especially appropriate where, as here, the judgment arbitrarily and capriciously destroys the very foundation on which it is based: the license—and with it, the worth of the facilities and the public service founded thereon. It also, in this case, serves best to accommodate both judicial and administrative authority and state and national jurisdiction. *Cf. Central New England Ry.* v. *Boston & A.R.R.*, 279 U. S. 415; *Village of Mantorville* v. *Chicago, Great Western R.R.*, 8 F.Supp. 791 (D.Minn. 1934).

III

THE JUDGMENT BELOW IS BEYOND THE JURISDICTION OF THE NEBRASKA COURT SINCE THE FINDING OF INADEQUACY OF CONSIDERATION, AN ESSENTIAL BASIS FOR THE JUDGMENT, INVOLVES THE DECISION OF MATTERS NOT WITHIN ITS JURISDICTION TO DETERMINE

A further reason for reversal is in the *grounds* for the judgment. We have pointed out in our main brief that the court below relied upon the decision of several questions, determination of any one of which invalidates the judgment resting thereon (pp. 40-60; 75-78). We shall here, in view of the Government's brief, discuss only the Nebraska Court's conclusion, essential to its decision, that the consideration was inadequate. There the court below necessarily relied upon the determination of matters beyond its jurisdiction to determine.

It warrants repetition that this case has throughout been dealt with on all sides as presenting a contest over a going radio station, the very essence of which is the federally granted license. The finding of inadequacy of consideration, in particular, upon which the court primarily relied rests for the most part upon the value inhering in the license itself.

Narrowing the form of the decree, therefore, as the Government suggests, ignores the real character of the suit and the real basis for the judgment. This would be treating the case as one to set aside a lease of physical property alone—as one where the court was concerned only with a transaction involving physical property. And that case has never been presented or litigated. Although, as the Government aptly points out (Brief, p. 16), it is the "physical property of the station, over which *alone* the court claims jurisdiction", it nevertheless relies upon the license, over which it admittedly has no jurisdiction, to undo the transaction approved by the Commission. The court below has determined the validity of the transfer of a going radio station, not just of a transfer of property. And any effort to reframe the judgment so as to appear to apply only to tangible property is artificially to change the char-

acter of the entire case and at the same time to permit the determination of the validity of the transfer of the license. Could the result below have been reached if the court had acted, as it purported, only upon the physical properties?

The attempt of the court below to argue that it acts only upon what is within its jurisdiction, even though its act directly and necessarily disposes of the license, is not unlike the attempt of some States to circumvent their inability to tax property beyond their jurisdiction by framing a formula of tax computation which *apparently* seeks to reach only tax subjects within the taxing jurisdiction, but whose effect is far broader. This Court has consistently refused to give effect to the verbalistic shadows of such attempts. If the substance of the tax, as administered, results in the subjugation of property without the State to taxation, the tax will be invalidated. *E.g., International Paper Co.* v. *Massachusetts*, 246 U.S. 135, 140-143. See (*Note*) 38 Harvard Law Review 361 (1924). So, too, distinguishing shadow from substance in the instant case will reveal that the court below is really asserting jurisdiction over the very subject it alleges it ignores. What the court really has acted upon, what it has really disposed of, if we forget legalistic refinements, is the license.

Furthermore, the finding of inadequacy of consideration rests upon matters within the primary jurisdiction of the Commission (Petitioners' Brief, pp. 52-60). And, further, the finding itself, requiring as it does the payment of a still higher price, encroaches upon Commission jurisdiction.

The record of the Commission, as the Government's brief points out (p. 17), has by no means been consistent in passing upon the factor of price, but in the latest case cited, *Travelers' Broadcasting Service Corp.*, 7 F.C.C. 504 (1939), the Commission in disapproving an assignment of license stated (p. 506):

> "It is by no means clear in this record that the assignee will get properties of substantial value in return for assuming this $1,500,000 obligation other than the extent to which the right to use the wave lengths is treated as valuable property."

This administrative inconsistency results from the phenomenal development in the field of radio. The letter to the Congress quoted in the Government's brief (pp. 26 *et seq.*) reflects this situation. However politic from an administrative point of view it may be for the Commission to await congressional clarification of its powers, the *law* must be applied in this case. Administrative timidity is not administrative construction. As Senator Dill, Senate floor manager for the Bill resulting in the 1934 Act, has said:

> "Subsection (b) of Section 310 . . . requires that the Commission secure full information concerning any proposed transfer, and that no transfer shall be made until the Commission consents in writing. The purpose of that provision was two-fold . . . second, to prevent the trafficking in wave lengths, that is, the selling of licenses as such.
>
> . . . . . .
>
> "The Congress did not specifically say a licensee should not transfer or sell his license for more than the value of the tangible property used for broadcasting, but *it was believed that the requirement of the Commission's consent to the transfer in writing would cause it to secure full information regarding the transaction and that because of the spirit and tenor of the law the Commission would not permit the selling of wave lengths.*
>
> "The record of transfers approved by the Commission shows that it has absolutely failed to prevent such sales. Licenses, and particularly broadcasting licenses, are sold for five and even ten times the value of the tangible property involved, so that the only thing station owners could be selling is the wave lengths." (Dill, *Radio Law* (1938), pp. 208-209.)

There has, in fact, never been a more crucial period in the radio industry than is involved in the present projection of this issue of price for radio stations. Smith, "The Radio Boom and the Public Interest," *Harper's Magazine* (March, 1945), p. 315; *Variety* (December 20, 1944), p. 19; Speech of Chairman Porter, *Broadcasting* (March 19, 1945), p. 17; testimony of Commission General Counsel,

now Commissioner, Denny, Hearings in H. Res. 21 (78th Cong. 2d Sess.) Vol. IV, pp. 4197-4198.

The supply of radio frequencies is well-nigh exhausted; new construction is impossible; earnings are artificially high and market values inflated. The implications to the public of such a trend are clearly ominous. Broadcasting was intended by Congress to be and, obviously should be, a highly personalized service resting upon the character and competence of the individual familiar with and serving the needs of a local community; but the inevitable effect of this trend will be to force this public service into the hands of investment bankers, insurance companies, and other large aggregations with the wealth necessary to buy a station. Chairman Porter of the Commission, in a recent speech, has sounded a warning against the participation of Wall Street in this public service (*Broadcasting* (March 19, 1945), pp. 17 *et seq.*). And there is a recent harbinger, in the announcement of the proposed purchase of KHQ, a 5 kilowatt station in Spokane, Washington, for $850,000, by investment bankers (*Broadcasting* (April 9, 1945), p. 17), of what will be the rule unless the trend to higher and higher prices is stopped. The judicial imposition of standards fostering that trend is hardly to be commended. The failure of the Commission thus far to use its power to stop this spiral is insufficient ground for the State courts assuming authority to give an impetus in an opposite and more dangerous direction by fixing values founded on the capitalization of the license. And the Commission itself has now felt impelled to discharge its responsibilities as the result of the great increase in station prices. See Appendix, *infra*, p. 51.

The present consideration is, obviously, at the upper limit permissible, short of going beyond going-concern value and attributing property to the license itself. The Government itself recognizes that the rental alone already involves "an expectancy that the license will be continued, which would cease with a termination of the license." (Brief of United States, p. 17.) The effect of the judgment below will be to require an even higher price. This,

the Government recognizes (Brief, p. 16), "will bear upon the Commission's exercise of the authority committed to it by the Communications Act." The same result, indeed, is inevitable under the procedural strategy recommended by the Government. For there, too, the State court is permitted to have the whip hand to force an even higher price.

IV

THE JUDGMENT BELOW CANNOT BE SUPPORTED ON THE GROUND OF INADEQUACY OF CONSIDERATION, SINCE THAT FINDING IS INTERMINGLED WITH A CONCLUSION OF LAW ON FEDERAL QUESTIONS AND WITHOUT SUPPORTING EVIDENCE, WHICH THIS COURT WILL, ACCORDINGLY, REVIEW TO PREVENT DENIAL OF A FEDERAL RIGHT

The judgment must fall, in any case, since it rests on a finding involving a violation of federal statute and is without supporting evidence. In such a case this Court will itself review the record to determine whether conclusions of law on federal questions were intermingled with the finding of fact and the denial of the federal right is without fair support. The finding of inadequacy of consideration is an essential ground of the judgment below. Yet, however the judgment be framed, it deprives petitioner WOW, Inc. of its federally granted license. That finding necessarily involves attributing a property right to the federal license contrary to the Communications Act and is thus left without any evidence in the record to support it. The judgment, itself, therefore, depriving petitioners of their property without due process of law and denying them the federally granted license without any supportable basis, must fall.

The Supreme Court of Nebraska, in its opinion of March 10, 1944 (R. 745 *et seq.*), considered *seriatim* a number of grounds advanced for upsetting the transfer of Radio Station WOW. It concluded in petitioners' favor on the following: (1) the "first question" as to the power of the directors of the Society to lease the station (R. 747-48); (2) the "next question" as to modification of the lease (R. 748); (3) the "charge" that the dominant pur-

pose of the transfer was to utilize the station to propagandize for the public power movement (R. 753-54); and (4) the "further charge" as to the plan of the officers to procure a benefit and profit for themselves, friends and associates (R. 754). On this charge the Court said:

> "The record discloses that none of the officers and directors of the Society have any interest in lessee nor any agreement with anyone, by which they have now or may in the future claim any interest therein. None of them have any interest in the purchase of the Nebraska Power Company property by Consumers, either directly or indirectly. . . . Fraud is never presumed but must be established by whoever alleges it and in examining the record we fail to find any evidence of actual fraud on the part of the officers and directors of the Society" (R. 754-755).

The Court then considers the "next question" of whether there was "legal or constructive fraud" (R. 758). It said:

> "If the question of inadequacy of income alone were to be the sole guide to our determination in this matter it would be a serious question, whether or not the lease should be set aside, but in determining this question we must carefully analyze the facts leading up to its disposition together with the terms and conditions thereof" (R. 756-757).

This involved a combination of three distinct elements: (a) inadequacy of income; (b) terms and conditions of the lease, and (c) facts leading up to the consummation of the lease. The court expressly excluded the possibility that any one or a combination of any two of these constituent elements would adequately and independently support the judgment of the court, and made clear that it required a combination of all three for an adequate support of its judgment. We are not left to conjecture. There is no question that inadequacy of consideration is an essential basis for its judgment.

That finding, however, cannot be supported. It is well settled that where denial of a federal right is involved, as here, this Court will review the record and itself determine

whether conclusions as to federal questions are intermingled with the finding and whether it can be supported by evidence in the record. As this Court said in *Kansas City So. Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591, 594:

> "While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. . . . When due regard is had for the rule before indicated, and so often applied in other cases, it does not admit of doubt that in the present case we may examine the evidence, which has been properly incorporated in the record, to determine whether the general finding necessarily involved the decision of questions of law bearing upon the Federal rights set up by the garnishee. And when this is done it is manifest, as is amply illustrated by the resume which we have given of the evidence and contentions of the parties, that the finding necessarily involved the decision of questions of the interpretation and application of the interstate commerce act. . . ."

Again, in *Creswill* v. *Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261, the Court said:

> "While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the

facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

See also: *Stanley* v. *Schwalby*, 162 U.S. 255, 278-279; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U.S. 655, 668-669; *Ancient Egyptian Order* v. *Michaux*, 279 U.S. 737, 744-745; *State Tax Comm. of Utah* v. *VanCott*, 306 U.S. 511, 514; *United States* v. *Pink*, 315 U.S. 203, 217.

In the present case, the finding of inadequacy of consideration necessarily rested upon a valuation of the rights contained in the license contrary to the Communications Act and is otherwise without any supporting evidence. A comparison of the rental alone for the transfer of the station, an average of $74,000 per year (R. 756)—leaving entirely aside the other very valuable considerations (see *infra*, pp. 47-48)—and the value of the properties leased, at the outside $174,000 (R. 581), makes clear that a finding of inadequacy of consideration here can rest only upon the value inhering in the Federal license to broadcast (see *supra*, pp. 7-9). The income of recent years relied upon by the court (R. 756), as well as the higher price which the judgment below requires will, as the Government aptly states (Brief, p. 17), "cease with a termination of the license."

We think it clear that the transfer of the station cannot be invalidated by thus valuing the rights granted by the federal license. In the license it formerly held, the Society owned nothing upon which the Nebraska Court could place a value as a basis for a finding that the consideration was inadequate. The Society did not own the monopolistic privilege of using a frequency. It was merely the licensee of a privilege, granted by the public, to use the frequency; and that, for only a limited period of years—a maximum of three under the statute (Section 307(d)).

Indeed, the Communications Act clearly forbids any recognition of a property right in the frequency. The very purpose of the Act, as declared by Section 301, is "to provide for the use of" radio channels, "but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license

shall be construed to create any right, beyond the terms, conditions, and periods of the license." And Section 309(b)(1) prescribes that a "license shall not vest in the licensee . . . any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein." Yet, the finding must rest on a valuation which at the least is largely attributable to "an expectancy that the license will be continued" (Brief of United States, p. 17); in other words, it is predicated on a property interest inhering in the license. Plainly, a holding that the Society can sell its station properties only at a figure which involves payment for the frequency attributes an essential incident of ownership or dominion over the licensed frequency—a "right" in the "use of the frequency" beyond the "term" of the license and in a manner other than "authorized" therein—contrary to the statute. For that reason alone, the judgment below must fall.

Once this improper factor is removed, moreover, the record is entirely devoid of any support for the finding that the consideration to be paid is inadequate. An analysis of the record shows the following:

The Society by the terms of the lease contract leased certain designated broadcast facilities for a rental of $1,111,896 for 15 years. Other highly valuable considerations accrued to the lessor under the lease. These are set out in the text at pages 52-55 of our first brief. One of the most important elements is the obligation of the lessee to keep abreast of all improvements in the art and to purchase and install equipment to that end. This means not only an initial outlay of hundreds of thousands of dollars by the lessee in purchasing frequency modulation and television broadcast equipment, but the equally important burden of several years' substantial operating losses during the infancy of these new developments. Thereafter, at the termination of the lease, the entire establishment as improved and expanded is to be returned to the Society.

Aside from the foregoing considerations passing directly from lessee to lessor, the Society obtained certain other substantial and desirable benefits. In order to realize them, the directors of the Society were compelled to adopt a

policy of disposing of the station. These benefits which are of a continuing nature are:

(a) By disengaging itself from the operation of the radio broadcasting business, purely commercial in nature, the Society has eliminated a real and dangerous threat to the tax-exempt status of its broad operations as a fraternal benefit life insurance society (R. 202-208, 289, 293, 297-298, 301-305). (It was of course realized that the sale could not be made on the basis of tax exemption benefits but that it must be effected to purchasers who are fully taxed with a consequent great impairment of net income (*e.g.*, R. 291-292, 314-315).)

(b) Disturbing dissension between the personnel of the radio department and the insurance department of the Society, due to wage differentials has been removed (R. 319).

(c) The officers' and directors' energies and attention are no longer divided between the affairs of the station and the primary affairs of the Society, to-wit, the writing of life insurance and protecting the vast investments underlying the insurance (R. 289, 317).

Supporting the adequacy of the income as shown by the terms of the lease, the officers and directors of lessor, who had operated the radio station since its construction, and after having made diligent effort for more than five years to make a disposition of the radio station most beneficial to the lessor Society, testified that the income of the lease was far in excess of any offer that they had been able to secure from any other source (*e.g.*, R. 287 *et seq.*). Eminently successful business men in various commercial activities in the city of Omaha expressed their judgments that the income was adequate for the property leased, and in addition confirmed the judgments of the officers and directors of the Society that it was to the best interest of the Society to be relieved of the operation of the radio station, in order that they might concentrate their energy on its primary business of insurance. (*E.g.*, R. 512-515.)

Even more convincing were the leading executives in the radio broadcasting industry of this nation who testified

from their experience in having purchased, sold and leased principal radio properties in this country, and expressed their opinions upon the question of adequacy of the consideration received by the Society under the lease: Niles Trammell, President, National Broadcasting Company (R. 544-545); J. Harold Ryan, President, National Association of Broadcasters (R. 582); Gardner Cowles, Jr., President, Iowa Broadcasting Company (R. 619); Joseph O. Maland, Vice President, Radio Station WHO, Des Moines, Iowa (R. 647); Harold Hough, President, Oklahoma Broadcasting Company, Inc. (R. 640). These opinions were unanimous that the consideration was adequate. They are set out in our first brief (pp. 52-53). No witness testified to the contrary. The court below disposed of this uncontradicted evidence by stating *"we do not agree with their opinion"* (R. 760). The Government does not agree with the Nebraska Court but with the uncontradicted testimony of these witnesses, as evidenced by the following statement in its brief (pp. 16-17):

> "The physical property of the station, over which alone the court claims jurisdiction, is worth not more than $175,000. The radio station, which includes the physical property, the license, and the good will and going concern value, was leased by the Society to Radio Station WOW, Inc. for a fifteen year term under an agreement which the court found provided an average net rental of $74,000 per year. This the court held to be inadequate (R. 756). Capitalizing this figure (cf. R. 513) produces a value of approximately $1,000,000, attributable largely to intangible elements such as good will, going concern value, and an expectancy that the license will be continued, which would cease with a termination of the license."

The ground for denying the federal right, therefore, is insupportable and the judgment resting thereon must fall.

CONCLUSION

In conclusion we submit the State court is without jurisdiction to nullify the license or to hamper the administrative agency in the exercise of its licensing functions. Any effort to separate the license and the property is unrealistic

and worse than futile and is contrary to the basic character of this entire case. To permit the State court to remove the licensed property is to endow it with the authority to close down an essential public service and to nullify the license by the legally quickest and practically most effective method.

It must be emphasized, this is not a case of procedural strategy but one of basic jurisdiction to set aside a single transaction involving wholly one unified operation.

Moreover, it is submitted that this Court will not send down a mandate authorizing the State court to provide for a still higher price, thus necessarily evaluating as a property interest the public frequency contrary to the statute and to the great social policy sought to be effectuated thereby.

Finally, on the one point essential to respondent's case on the merits—inadequacy of consideration—the entire record refutes the conclusion of the Nebraska Court. Under settled principles this Court will not permit the denial of a federal privilege in such a case.

We can but submit that the State court is without jurisdiction and the respondent's petition must be dismissed.

Respectfully submitted,

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APPENDIX

On March 9, 1945, an application was filed with the Commission for its approval of the transfer of license of Broadcast Station WINS, New York City, operating on 1010 kilocycles with 10 kilowatts power and holding a construction permit to increase power to 50 kilowatts. The price proposed to be paid for the station is $1,700,000. (See *Broadcasting* (April 16, 1945), p. 61). On April 10, 1945, the Commission designated this application for hearing (Docket No. 6755) on the following, among other, issues:

To determine the value of the physical assets of station WINS.

To determine the going-concern value or goodwill of station WINS.

To obtain full information concerning the various elements that entered into a determination of the purchase price for Station WINS.

To determine whether any consideration is being paid for the frequency.

To determine what portion of the consideration is attributable to assignor's outstanding construction permit to operate with 50 kilowatts power.

. . . . .

To determine whether the sale of station WINS, when viewed in the light of other applications pending and other transfers and assignments of stations to and from the assignor or persons under common control with the assignor, constitutes trafficking in licenses.

To determine whether the purchase price proposed to be paid by assignee for Station WINS will adversely affect its ability to operate in the public interest.

. . . . .

To determine whether, in the light of evidence adduced on the foregoing issues, public interest would be served by approval of the assignment of license of Station WINS.